Supreme Court, U.S.
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MAY 16 1989
JOSEPH F. SPANIOL, JR.
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No. 88-1658

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

LOUISBURG GRAIN CO.,INC.,
A. SCOTT ANDERSON
AND E. SYLVIA ANDERSON, Petitioners,

v.

CITY OF ARKANSAS CITY, KANSAS, CITY OF HESTON, KANSAS, AND SOUTHWEST NATIONAL BANK, WICHITA, KANSAS, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

# REPLY MEMORANDUM OF PETITIONERS

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May 16, 1989

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REPLY MEMORANDUM OF PETITIONERS

Respondents in their opposing Brief attempt to rewrite the holdings of this Court in Patrick v. Burget, 108 S.Ct. 1658 (1988), and Youakim v. Miller, 425 U.S. 231 (1976). Respondents state generally at page 7: "... issues not raised or resolved in the lower court may not first be presented to this Court in a Petition for Writ of Certiorari." However, Patrick simply footnotes Youakim by stating: "This Court usually will decline to consider questions presented in a Petition for Certiorari that have not been considered by the lower court."

In Youakim, this Court noted that the general rule was "not inflexible." In fact, the Youakim court stated that circumstances justified the review of

the issue not appealed to the extent of vacating the judgment. Youakim, 425 U.S. at 234-35.

Petitioners strenuously disagree that the issue of due process was not raised below; even though the magic words "due process" were not used in the Motion for Rehearing, Petitioners clearly argued that the Louisburg Grain Co. conveyance was outside the scope of review, and should be allowed to stand as a proper conveyance. (See pages A-26-30.)

Respondents miss the point and argue against themselves by asserting the general rule of Youakim. Respondents specifically advised the Kansas Supreme Court they sought no review of the Louisburg Grain Co. conveyance, but obtained a reversal and a finding of fraud (see A-1, A-2; A-81-82), when

Petitioners had no opportunity to address that issue. These same Respondents now argue, inconsistently and in error, that an issue not raised below in the Kansas Supreme Court should be ignored by this Court.

The Kansas Supreme Court has the power in exceptional circumstances to consider an issue not raised at the trial court or on appeal. State v. Puckett, 230 Kan. 596, 640 P. 2d 1198 (1982), cited by Respondents at page 9. The Kansas Court then cautioned:

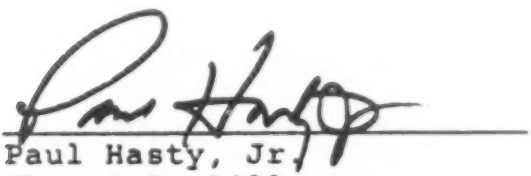
> ". . . where an appellate court raises an issue sua sponte, counsel for all parties should be afforded a fair opportunity to brief the new issue and to present their positions to the appellate court before the issue is finally determined."

Puckett, 230 Kan. at 601.

When the Kansas Supreme Court forgot its own caution, and instructed a finding of fraudulent conveyance, that Court denied the Petitioners due process.

Petitioners respectfully request that certiorari be granted in this situation.

Respectfully submitted,



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